

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 2

COUNTY AGENCY, INC., AND  
ESPLANADE PARTNERS LTD d/b/a  
ESPLANADE VENTURE PARTNERSHIP  
d/b/a THE ESPLANADE HOTEL, JOINT  
EMPLOYERS

Case No. 02-CA-188405

and

305 WEST END HOLDING, LLC d/b/a 305  
WEST END AVENUE OPERATING, LLC,

Case Nos. 02-CA-189863  
02-CA-195031

and

UNITED FOOD & COMMERCIAL  
WORKERS UNION, LOCAL 2013.

**POST-HEARING BRIEF OF RESPONDENT 305 WEST END**

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Not a shred of evidence in the record of this case suggests any anti-union animus on the part of Respondent 305 West End,<sup>1</sup> which purchased the 305 West End property from the owners of what was formerly known as the Esplanade. The hiring executives were explicitly told not to inquire about union status, and there is no evidence of any statements, slurs, or insinuations that would suggest a desire to avoid hiring union employees. Indeed, the fact that enough employees from the former Esplanade were hired to create a dispute regarding successorship makes it obvious that union status was not a factor in hiring; if it had been, Respondent would presumably have hired fewer former Esplanade employees and evaded the successorship issue entirely.

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<sup>1</sup> Toward the end of the hearing, the Counsel for the General Counsel filed an Amended Complaint seeking to join Ultimate Care Assisted Living Management as a Respondent, arguing that it is a joint employer with 305 West End. Although the managers who were involved in interviewing and hiring employees at the property *prior* to its purchase by 305 West End were employed by Ultimate Care, the latter entity's involvement since the purchase has been limited to transitioning the property to its current management. The record reveals only one manager employed by Ultimate Care Assisted Living Management who is stationed at 305 West End: Regional General Manager, Faraz Kayani. Every other manager and employee at the property is employed by 305 West End Operating, LLC. Current Board law on this topic permits a finding of joint employer status only if the joint employers "share or codetermine those matters governing the essential terms and conditions of employment." *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (Aug. 27, 2015), at 2. And before that analysis can even begin, there must be a common-law employment relationship between the putative joint employer – Ultimate Care – and the employees. *Id.* No evidence in this case suggests that there is a common-law employment relationship between Ultimate Care and 305 West End's employees, that Ultimate Care "shares or codetermines" with 305 West End the terms and conditions of the 305 West End's employees, or that Ultimate Care "possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining." The sole evidence in the record regarding Ultimate Care Assisted Living Management is that Faraz Kayani and the persons who considered applications for employment at 305 West End and helped to train the employees are employed by that entity. There is no evidence to suggest that Ultimate Care has had any role whatsoever in determining the terms and conditions of the employees' employment since 305 West End's purchase of the property in December 2016. *See* Tr. 211 ("Ultimate Care comes as needed. So in the beginning, they ... would be there more. And now we're running, so we don't need as much. So they just visit ..."); Tr. 214 ("[T]hese are all regional. Regional people do not work at the facility.").

Many of the employees initially hired in December 2016 were Building Service Workers (“BSW”) whose hiring was required by New York City ordinance; thus, a “substantial and representative complement” of employees whose hiring was actually voluntary and intentional did not arise at 305 West End until April 2017, after these employees were evaluated and most were discharged and replaced. By that time, the majority of employees in 305 West End’s complement were not former employees of the Esplanade, and thus 305 West End is not a successor of the Esplanade under *NLRB v. Burns Security Service*, 406 U.S. 272 (1972).

In addition to the exclusion of the BSWs, the successorship analysis must account for the fact that many of the former Esplanade employees were not in fact members of the bargaining unit, despite the broad unit definition in the collective bargaining agreement. The Union – the successor to a “sweetheart union” that accommodated the owner of the Esplanade with employer-friendly terms in exchange for bribes – both knew and tolerated the fact that many of the employees did not consider themselves members of the Union and did not pay dues. The Union did not seek to collect dues from these employees, did not seek to enforce the union security clause in the CBA, and actively refused to represent recreation employees who were encompassed within the CBA’s unit definition. In short, this was a “members-only” Union despite the broad unit definition, and the employees who did not pay dues and did not consider themselves members of the Union cannot be counted as unit employees for purposes of the successorship analysis.

The record demonstrates that the accusations of discriminatory hiring and unlawful refusal to bargain are without merit, and the charges against 305 West End should be dismissed.

## **BACKGROUND**

Respondent Esplanade, Respondent County Agency and the Union. The property located at 305 West End Avenue in New York City was run for many years as The Esplanade, an

independent senior living residence. Tr. 81. It was not licensed by the New York Department of Health and provided no medical services such as those required for an assisted living residence. Tr. 172-173, 201, 218-219; 383-384. It was simply a residence where elderly people could live. Tr. 383-384. An unlicensed community is not responsible for the residents' well-being, and does not have to comply with any Department of Health standards or regulations. *Id.*

The property was owned by the Scharf family, and was operated for a long time by Solomon Scharf, and thereafter by his son Alexander, known as "Ali." Tr. at 81, 82, 251-252. The employees at the Esplanade were employed by County Agency, a company under contract with the Esplanade to supply workers. R-48, R-1; Tr. 202, 203-205, 491-493; 127, 152-153, 187-188, 893, 911. Some of the County Agency employees at the Esplanade were members of United Food and Commercial Workers Union, Local 348S, and were covered by a collective bargaining agreement between County Agency and Local 348S until approximately 2013. R-48.

From at least some time in 1989, up through and including June 2011, officers of Local 348 by the names of Anthony Fazio, Sr., Anthony Fazio, Jr., and John Fazio, Jr., participated in a scheme to enrich themselves by extorting payments from business owners whose employees were members of the local. *U.S. v. Fazio*, 770 F.3d 160, 163 (2d Cir. 2014). *See also Fazio v. United States*, 2018 WL 357310, at \*1 (S.D.N.Y. Jan. 10, 2018) (in order to obtain the payments, the defendant threatened employers with labor disruption and/or physical harm); *United States v. Fazio*, 2012 WL 1203943, at \*7 (S.D.N.Y. Apr. 11, 2012), *aff'd*, 770 F.3d 160 (2d Cir. 2014) (the government proffered evidence that the Fazios "pushed out" rival unions by intimidating tactics including, in one instance, a physical altercation).

Importantly for purposes of this case, the Fazios' scheme included having Local 348 knuckle under to the employers who paid the bribes, instead of operating in a proper arms-length

fashion and advocating on behalf of the employees. “Because of the Fazios’ collusive relationship with the employers with which they were supposed to be negotiating at arm’s length, Local 348 had a reputation for being a ‘sweetheart’ union.” 770 F.3d at 163.

Among the business owners who paid bribes to the Fazios was Ali Scharf, owner of the Esplanade. See Government Sentencing Memorandum, *U.S. v. Fazio*, No. 1:11-CR-00873 KBF (S.D.N.Y.), Doc. 161 (Sept. 6, 2012) at p. 6 (Scharf paid bribes to the Fazios totaling \$70,000 from the mid- to late 1990s through 2009); see also Loss Calculation, *U.S. v. Fazio*, No. 1:11-CR-00873KBF (S.D.N.Y.), Doc. 161-1 (Sept. 6, 2012) (same); Verdict Form, *U.S. v. Fazio*, No. 1:11-CR-00873 KBF (S.D.N.Y.), Doc. 115 (May 17, 2012) (defendants guilty of RICO Conspiracy, RICO Substantive, Extortion Conspiracy, Extortion, and Unlawful Receipt of Labor Payments, including from the Esplanade at p. 5); Sealed Grand Jury Indictment, *U.S. v. Fazio*, No. 1:11-CR-00873KBF (S.D.N.Y.).<sup>2</sup>

The Union in this case, Local 2013, took over for Local 348S at the Esplanade after a period of internal (UFCW) trusteeship. However, few changes were made at the Esplanade following the change, and the dubious practices of Local 348S, reflecting in part the insidious influence of the Fazios’ scheme, were continued under 2013.

For example, although both the 2012 and 2015 collective bargaining agreements – the first between County Agency and Local 348S, the latter between County Agency and Local 2013 – included a “wall-to-wall” unit definition, the Union did not represent the Esplanade employees accordingly. The unit definition states: “The Employer recognizes and acknowledges the Union as the sole and exclusive collective bargaining agency for all of its full-time and part-time

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<sup>2</sup> Respondent respectfully requests that the ALJ take administrative notice of these documents, which are official filings in federal court. NLRB Bench Book § 16-201.

employees ... excluding executives, supervisors, and guards as defined in the Labor Management Relations Act as amended ...” R-1 at p. 1; R-48 at p. 1. Contrary to the unit definition, however, Local 2013’s Director of Collective Bargaining, Eugene Hickey, testified that the Union did not represent recreation employees (those who engaged in recreational activities with the residents); in fact, he testified that he actively discouraged a recreation employee who sought assistance from the Union in 2016. Tr. 306-307, 329; *see also* Tr. 657 (B\_\_\_ F\_\_\_, Recreation),<sup>3</sup> Tr. 769 (A\_\_\_ B\_\_\_, Recreation), Tr. 812 (J\_\_\_ F\_\_\_, recreation) (“I didn’t even know there was a union for many years.”). It is, in short, undisputed and even stipulated that the Union intentionally did not represent the recreation employees. *See, e.g.*, Tr. 657-660 (CGC: “We’ve already had the union define the relevant unit, which the recreation department is not in, and it was never claimed that they’d been in. ... ALJ: The point is it’s undisputed.”); Tr. 771 (ALJ: “It’s virtually stipulated...”); Tr. 810 (Counsel for the Union: “[A]lbeit we don’t have stipulation that recreation assistants were not in – was not part of the unit, the fact of the matter is it’s not a controverted item.”).

It was not only the recreation employees who were not represented by the Union, however, despite the “wall to wall” unit definition. Other hourly employees whom the Union supposedly represented had never paid dues or participated in the Union under Local 348’s stewardship, and they continued not to pay dues or consider themselves members of the Union after the change to Local 2013. Esplanade’s Executive Director, Marcy Salwen Levitt, identified eleven of them from memory. *See* Tr. 237-239 (C\_\_\_ G\_\_\_, W\_\_\_ L\_\_\_, C\_\_\_ R\_\_\_, S\_\_\_ H\_\_\_, M\_\_\_ A\_\_\_, I\_\_\_ B\_\_\_, N\_\_\_ C\_\_\_, B\_\_\_ N\_\_\_, A\_\_\_ B\_\_\_, C\_\_\_ F\_\_\_, J\_\_\_ F\_\_\_);<sup>4</sup> *see also* Tr. 602,

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<sup>3</sup> Pursuant to the ALJ’s order, all non-management employees have been identified by initials only to protect their identities. Tr. 925.

<sup>4</sup> Four others, M\_\_\_ de la C\_\_\_, N\_\_\_ E\_\_\_, D\_\_\_ G\_\_\_, and A\_\_\_ K\_\_\_, were no longer employed at 305 West End at the time of the hearing, but had been hired in the initial hiring in December 2016. *See* R-62. Of these, two were recreation employees.

609-612, 625 (C\_\_\_ G\_\_\_, front desk), 731, 734 (W\_\_\_ L\_\_\_, front desk), 784-785 (N\_\_\_ C\_\_\_, kitchen), 802-803 (M\_\_\_ A\_\_\_, kitchen); R-35-R-46. *Compare* Tr. 301 (Hickey: “We represent housekeeping, kitchen staff, waitresses, maintenance, and also concierge at the front desk.”); Tr. 325 (Baldoquin: “I formerly used to represent ... [t]he facility workers, which are housekeeping, front desk, kitchen, dining room servers” and maintenance employees, but not recreation employees). Several witnesses testified that T\_\_\_ H\_\_\_, the Union’s shop steward, knew that they were not members of the Union and often tried to recruit them unsuccessfully. Tr. 611-612, 731, 785, 791-792, 858, 862. As shop steward for the Union, H\_\_\_ had both the right and the obligation to enforce the union security clause, but she never did so.

Instead, the Esplanade’s Executive Director, Marcy Levitt, personally determined pay raises for hourly employees who were not paying dues to the Union, rather than pay them in accordance with the CBA. Tr. 236-240, 255-256, 734. Levitt’s testimony that certain employees were not in the Union is consistent with the Union’s own invoices to County Agency for dues and health insurance payments, which did not bill dues or health insurance premiums for those employees, and with the Esplanade payroll records for 2016, which show that these employees did not have dues deducted from their paychecks. *See* Tr. 237-239; R-35-R-46; GC-60. In short, the Union intentionally and knowingly declined to represent the recreation employees and the other employees who did not pay dues and whose raises were decided not according to the CBA but by Levitt herself.

Contrary to law and to the CBA’s unit definition, several of the individuals who paid dues and were considered members of the Union were actually managers and supervisors, like D\_\_\_\_ D\_\_\_\_ and T\_\_\_\_ B\_\_\_\_. The employees complained to Local 348S on January 24, 2012, that “some supervisors in union, and discipline other members”, but neither Local 348S nor Local

2013 corrected that situation, though T\_\_\_ H\_\_\_ was the shop steward for both Local 348S and Local 2013, from as far back as 2011. R-67 at Union.6.5.18-0005 (grievance identifying D\_\_\_ D\_\_\_ as supervisor who terminated grievant), -0012 (reflecting complaints from employees about union members disciplining other members), -0013 (showing that T\_\_\_ H\_\_\_ was shop steward as far back as 2011). *See also* Tr. 146-150 (D\_\_\_ D\_\_\_ admitting she wrote “Food Services Director” on resume and was in one of the “leading positions” along with T\_\_\_ B\_\_\_ and one other, and that she managed a staff of 30 and managed kitchen inventory), 154 (she earned \$22 per hour), 160 (she worked with other managers to operate the kitchen), 229-234 (D\_\_\_ D\_\_\_ and T\_\_\_ B\_\_\_ were kitchen managers; D\_\_\_ D\_\_\_ was department head, went to department head meetings and was authorized to issue discipline), 242-243 (D\_\_\_ D\_\_\_ and T\_\_\_ B\_\_\_ were in the Union even though they were manager/supervisor), 245-246 (D\_\_\_ D\_\_\_ was promoted to director by Levitt and Solomon Scharf, and had authority to deal with her employees as she saw fit), 248-250 (Levitt personally observed D\_\_\_ D\_\_\_ supervising her subordinates), 253-254 (D\_\_\_ D\_\_\_ hired kitchen and wait staff), 556-557, 584 (D\_\_\_ D\_\_\_ introduced herself as food service director), 559-560 (D\_\_\_ D\_\_\_ confirmed in interview that she had the four types of responsibilities she identified in her resume), 612-615 (D\_\_\_ D\_\_\_ “was in charge of the kitchen”), 640-641 (D\_\_\_ D\_\_\_ gave the hiring managers the kitchen tour while she gave direction to kitchen employees), 669-671 (B\_\_\_ N\_\_\_ identified D\_\_\_ D\_\_\_ as her supervisor), 735-737 (witness observed D\_\_\_ D\_\_\_ supervising kitchen employees), 773-774 (D\_\_\_ D\_\_\_ and T\_\_\_ B\_\_\_ supervised employees in the kitchen and dining room), 781-784 (D\_\_\_ D\_\_\_ was the overall kitchen manager who oversaw and disciplined employees, and T\_\_\_ B\_\_\_ was a supervisor in the dining room), 788 (D\_\_\_ D\_\_\_ hired the witness), 794 (D\_\_\_ D\_\_\_ verbally disciplined employees and gave direction), 800 (D\_\_\_ D\_\_\_ was witness’s boss), 813-814 (D\_\_\_ D\_\_\_ was the person

you went to if you needed anything from the kitchen); GC-21 at p. 2 (D\_\_\_ D\_\_\_ job application), R-55; *compare* Consolidated Complaint at ¶ 13.

Notably, D\_\_\_\_ D\_\_\_\_, the Esplanade’s long-time kitchen manager, not only continued to be a member of the Union, but recruited for the Union and testified for the CGC at the hearing. *See* Tr.137-146 (D\_\_\_ D\_\_\_ called by and testified for CGC), 785, 791-792 (D\_\_\_ D\_\_\_ gave N\_\_\_ C\_\_\_ papers to join and to obtain health insurance from the Union). In sum, the Union here behaved like a “members only” union rather than as the exclusive bargaining representative of all of the non-supervisory employees at the Esplanade. The Union’s own records, and the failure of its own shop steward, T\_\_\_ H\_\_\_, to take action demonstrate its acquiescence with this arrangement.

Engel Burman. In 2016, The Engel Burman Group, Ltd., became interested in purchasing the property at 305 West End Avenue to turn it into a high-end assisted living residence licensed by the New York Department of Health. Engel Burman has developed, built, and owns and operates numerous such properties all along the Eastern seaboard, including many on Long Island. Tr. 498-499.

A licensed assisted living property is very different from an independent living residence. Unlike an independent residence hotel, the regulations governing assisted living buildings require the operation to take legal responsibility for the well-being of its residents. All staff must be trained on how to recognize potential medical issues with the residents. Tr. 382-383, 402-403. For example, a front desk operation in an assisted living complex is required to have residents sign in and out, to monitor comings and goings, and to be able to direct healthcare providers appropriately. Tr. 384. Housekeepers cannot simply clean a room; they must determine whether the resident has eaten, whether the resident appears healthy or possibly confused or is otherwise acting abnormal.

Tr. 384-385. In an unlicensed facility like the Esplanade, a resident could simply go to the restaurant and order ice cream. In an assisted living facility, the kitchen staff would be required to check the order against a list of dietary restrictions for the resident to ensure that he or she is permitted to eat ice cream. Tr. 405-406.

The property at 305 West End is intended to be not only assisted living, as opposed to independent living, but also to be a flagship property for Engel Burman, and thus to implement the highest possible standards in the assisted living industry. Tr. 399-400, 498-499.

Purchase of the Property. Upon hearing about the planned sale, the Union sought help from Esplanade owner Ali Scharf to work out a successorship agreement, but no representative of Respondent 305 West End signed such an agreement. Tr. 291-292, 301-305; GC-13, GC-39, GC-40, GC-41.

In preparation for the takeover of the property, numerous executives from Engel Burman's subsidiary, Ultimate Care Assisted Living Management, came to visit and inspect the Esplanade property. What they saw appalled them. The entrance was dirty and cluttered, to the point where light did not penetrate the glass in the entrance hall. Tr. 396. The carpet was so dirty, it stuck to the feet. Tr. 752. Some of the residents' rooms had bedbugs, and the rooms were not adequately cleaned. Tr. 696-697. The kitchen was the worst operation Vice President of Food and Beverage Randy Tremble had ever seen in his twenty years of working in the assisted living food service area. There was an accumulation of grease and dirt on unused equipment, there were visible mouse droppings, roaches were observed on the walls, and it contained numerous health code violations, such as gaps in the drop ceiling, an absence of lights in some areas, and broken lightbulbs in others. Tr. 421, 555-556, 634-635, 666-667, 752. The office of the Food Service Director (D\_\_\_\_ D\_\_\_\_) contained so much junk, it seemed like its occupant was a hoarder. Tr. 555-556, 635. There was

food in the freezer that was moldy, that was uncovered, unlabeled, freezer-burnt, and some dated as far back as 2013; nearly everything in the freezer had to be thrown out and restocked. Tr. 422, 589-590. The basement in which the residents engaged in arts and crafts was dingy and dark, and the employees' break room in the basement had no window, no ventilation, and one light. Tr. 397. The kitchen staff's break room was another tiny, dingy room off the kitchen. Facilities on the other floors were also dusty and dirty. Tr. 397-398. The overall impression of the facility was that it was poorly operated and cared for and that the conditions of the building reflected a lack of caring, lack of administrative competence, and a lack of teamwork among the staff. Tr. 506-507, 634-635.

The Employment Application Process. The Esplanade employees were alerted to the upcoming sale by meetings and by notices announcing the sale and two job interviewing fairs. Tr. 83-84, 129, 499-501; Exhs. GC-4, GC-5. The first job fair was held at the Esplanade itself exclusively for Esplanade employees, and a few weeks later, another was held at an off-site location, but was open to any Esplanade employee who did not make it to the first job fair. *Id.* Respondent 305 West End actually wanted to be able to hire existing Esplanade staff if possible, since they were more familiar with the residents and the building than the incoming managers. Tr. 630, 998-1000.

The interviewers for Respondent 305 West End comprised a group of experienced managers that have years of experience interviewing and making employment decisions for assisted living properties. They are all regional managers or directors employed by Ultimate Care whose area of authority includes 305 West End. Tr. 209-214, 220, 496, 501-503, 511, 547-548. Faraz Kayani has worked for the Engel Burman group for nine years, as waiter, receptionist, recreation assistant, executive director, and then regional executive director. Tr. 382. He has

worked in the assisted living field since he was sixteen. Tr. 385, 392-393. Vice President of Food and Beverage Randy Tremble has worked as a Director of Food and Beverage in the assisted living field for more than twenty years, and has conducted hundreds of interviews in that capacity. Tr. 553, 562-563. Vice President of Environmental Services Brian White oversees 16 facilities in that capacity, and has been working as a maintenance director in the assisted living field for some 30 years. Tr. 591-592. Vice President of Housekeeping Clement Walsh has held that position for two years, served as Director of Housekeeping for Engel Burman's Armonk property for two years before that, and was the assistant executive housekeeping director for the Grand Hyatt for seven years before that. Tr. 688-689. Regional Food Service Director Paul Senken was promoted to that position after serving as food service director for Engel Burman's Westbury property for thirteen years, after being a chef for most of his life before that. Tr. 627-628. He has conducted 75-100 interviews since his promotion to Regional Food Service Director, and a couple of hundred when he was food service director at Westbury. Tr. 629. Rich Youngberg has been Ultimate Care's Regional Director of Operations for four years, but has been with the company for fourteen years, working as executive director at three different properties. Tr. 748-749. He has done hundreds of interviews in his career. Tr. 750. Susan Murphy has been Ultimate Care's Regional Director of Dining Services for seven years, and has been in the restaurant operations business for forty years. Tr. 664-665. Erik Anderson, the Vice President of Human Resources, has worked in the field of Human Resources for 31 years, 26 in the health care field, and six with Engel Burman. Tr. 496-498. Each interviewer spoke with the applicants seeking work in his or her area of specialization. Tr. 502-503. Anderson mostly coordinated the job fairs and interviews, but did end up interviewing a few employees himself. Tr. 523.

All of the interviewers were explicitly instructed by Erik Anderson not to inquire about any applicant's union status, as well as the other protected classifications that the interviewers were familiar with. Tr. 511; Exh. R-24. The interviewers followed this directive. Tr. 563, 593-594, 637, 668, 692. The interviewers were generally aware that some employees were union members and some were not, without knowing individual details. Tr. 582, 596-597, 637, 644-645. Interviewer Rich Youngberg became aware through casual conversation with others that T\_\_\_\_\_ H\_\_\_\_\_ was the union shop steward, but neither he nor any of the other interviewers inquired or were informed of any other applicant's union status. Neither union status nor any other protected classification played any role in the hiring process. Tr. 419-420, 521-522, 563, 594, 637-638, 644-645, 698, 755-756. "I'm looking for an employee or an applicant that will become an employee that is good, knows the job, can learn, and that's all that matters." Tr. 419 (Kayani).

Assisted living operations require employees to have a real understanding of customer service and the needs of the residents, as well as some understanding of the Department of Health regulations governing assisted living facilities. A great deal of training is required to meet the requirements of these regulations. Tr. 383. Thus, the primary trait the interviewers were looking for when interviewing applicants, both former Esplanade applicants and outside applicants, was a good and upbeat attitude, willingness to adapt to new requirements, and the ability to communicate, even among staff normally considered "back of the house". Tr. 394, 399-401, 403-404, 456, 504-506, 633. All staff are responsible for ensuring that the property lives up to the operation's high standards and the Department of Health Regulations; thus, any and every employee is responsible for quality assurance and for communicating problems so that they can be resolved. Tr. 409. Residents in assisted living facilities generally stay for years, unlike the residents of a hotel, and pay huge prices for places in high-end assisted living facilities like 305

West End. The friendliness of the staff is an important factor in contributing to the residents' satisfaction. Tr. 402-404, 405-406. An applicant's core values were more important than experience in the job, because skills can be taught more easily than values. Tr. 548-549, 704-705 (Walsh) ("[I]t's all about attitude. If somebody is ... willing to learn, wanting to grow, ... gain experience ... I'm willing to train that person. We have people that ... have experience, and with their attitude, you know, they don't want to take directives, poor attendance. So [experience] doesn't really make my decision.").

Questions at the interviews related to whether applicants were team players, whether they liked their jobs, how the residents interacted with the applicants, and so forth. Tr. at 130 (M\_\_\_\_ B\_\_\_\_). The new expectations of the job were explained to them. Tr. 452-453. Other considerations included the ability of the applicant to work a weekend day and other scheduling issues, as well as job skills. Tr. 408, 585-587, 697, 758-760. Experience in the position was considered, but given the appearance of the property and the negative impressions the interviewers had about the operation when it was the Esplanade, experience at the property was not as important as the other factors. Tr. 408-409, 560-562, 585, 636. Esplanade did not give the interviewers access to the applicants' then-current personnel files. Tr. 512; R-24. The interviewers did not normally have access to previous personnel files anyway when hiring. Tr. 577-579, 653-654.

The interviewers were provided with checklists to use during the interviews, but the checklists were merely guidelines and were not necessarily kept or considered in the decision-making process. Tr. at 377-380, 432-435, 523-524, 567-568, 597, 642, 645-647, 702-703; GC-50. Decisions were not made regarding employment until after both job fairs were completed. All of the interviewers had input into the decisions. Tr. at 362, 435-437.

New York's Displaced Building Service Workers ordinance. Among the employees that were hired were a number of janitors, porters, handymen/ maintenance engineers, and housekeepers, all of whom fall within the definition of "building service workers" in the New York City Administrative Code § 22-505(a).<sup>5</sup> Section § 22-505 required that all such employees be retained for at least 90 days after the sale of the property. Thus, at least fifteen employees whom 305 West End would not otherwise have hired were retained pursuant to the ordinance, and attempt was made to retrain them to 305 West End's higher standards. Tr. 513-516, 694-695; R-25, R-26, R-62. Executive Director Kayani hoped to keep the housekeeping employees past the 90-day requirement if they could be retrained, since turnover costs money and additional training time. Tr. 999.

The Sale. Respondent 305 West End closed on the property on December 5, 2016. Employees who had applied to work at 305 West End were informed by telephone whether to come to work that day. GC-6; Tr. at 87-88. Some showed up initially and then left and never returned. Tr. 695, 719-720. Respondent 305 West End immediately began to implement its own standards, which were considerably higher than those of the Esplanade, in preparation for becoming a licensed assisted living facility. Tr. at 210, 219-220, 224-225. Extensive renovations have been occurring throughout the building and are still ongoing, and staff have been receiving extensive training regarding the new standards to be observed and upheld. Tr. at 91, 110, 135, 210, 219-223, 250-251, 253, 256-257, 411-413, 430-431, 439-442, 448-449, 451, 644, 697, 701, 743-744, 790. Changes have already been implemented in some areas, including the front desk –

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<sup>5</sup> "The term 'building service' means work performed in connection with the care or maintenance of an existing building and includes, but is not limited to, work performed by a watchman, guard, security officer, fire safety director, doorman, building cleaner, porter, handyman, janitor, gardener, groundskeeper, stationary fireman, elevator operator and starter, window cleaner, and superintendent." § 22-505(a).

where sign-ins and uniforms have been required since 305 West End took over – and the kitchen, where the menus are being significantly upgraded. Tr. 411-413, 423-428; R-7-R-10. Many employees are paid considerably more under 305 West End than they had been paid by County Agency at the Esplanade. Tr. at 89, 136. Benefits were greatly improved. Tr. at 133. The Department of Health has agreed to license the facility floor-by-floor for assisted living, with the seventh floor to be certified in April of 2018, and others to be certified as they are completed. Tr. at 221-224, 422-423, 449.

Once the required 90 days of employment for BSW employees had expired, Respondent 305 West End's management began the process of evaluating their performance to determine whether they should be retained. Tr. 706-707, 933-936. (A few had stopped coming to work and needed to be replaced earlier. Tr. 695, 719-723.) Most of the housekeepers did not meet the heightened standards demanded by 305 West End, but many of the maintenance personnel did. As a consequence, most of the housekeepers retained due to the New York City ordinance were discharged, while most of the maintenance workers were retained. R-11-R-23. Respondent 305 posted for the positions that were open, and it took a few weeks to hire replacements. Tr. 710-711, 722-723, 934-935, 939-940. Many of the housekeepers were replaced, but not all, because 305 West End determined that it did not require as many housekeepers as the Esplanade had employed. Tr. 516-518, 521, 594-595, 694-695, 697, 701-702, 933-934. But now that the housekeeping staff has transitioned from the BSW employees to workers selected by 305 West End, housekeeping is no longer a topic of concern. Tr. 999-1000.

Exhibit R-59 is the payroll register/ hours and earnings report showing hours and earnings for all employees employed by 305 West End between December 8, 2016, and April 20, 2017. Exhibit R-64 shows the employee roster as of December 2016, when Respondent 305 West End

took over the property. Tr. 950. Exhibit R-65 shows the roster as of April 20, 2017, after the BSW employees had been evaluated, discharged, and replaced. Tr. 952-953. There were a few housekeepers hired just before April 20, which rounded out the full complement of employees at 305 West End. *Id.*; *see also* Tr. 967. R-62 and R-63 show the employees who did not pay dues and did not consider themselves members of the Union, a situation known and tolerated by the Union. Tr. 958-959.

Successorship calculations.

**The Initial Hire in December 2016.** Of the 51 non-management employees hired by 305 West End in December 2016, twelve (12) of those were not former employees of the Esplanade, leaving 39 former Esplanade employees. Fifteen (15) of these 39 former Esplanade employees were hired not by choice, but by operation of the New York City Ordinance requiring that Building Service Workers be retained for at least 90 days after the building's takeover. Also, of the 39 former Esplanade employees, fifteen (15) did not pay dues to the Union and did not consider themselves members of the Union, and only two (2) of those were BSW employees, leaving thirteen (13) who were not BSW employees but were also not Union members. Importantly, the fifteen (15) who did not consider themselves members of the Union includes five (5) recreation employees whom the Union has acknowledged on the record that it did not represent, despite the broad unit definition in the CBA.

Thus, in December of 2016, subtracting from the total hiring complement of 51 the twelve (12) that were not former Esplanade employees, the fifteen (15) that were BSW employees, and the additional thirteen (13) that were not treated by the Union as members, the final total shows that only twelve (12), plainly less than a majority, of former Union members was hired voluntarily from the former Esplanade.

$$51 - 12 \text{ (non-Esplanade)} - 15 \text{ (BSW)} - 13 \text{ (non-Union)} = \mathbf{11}.$$

Even if one does not subtract the thirteen (13) non-BSW employees who did not consider themselves members of the Union, and subtracts only those who were not former Esplanade employees and those who were hired solely due to operation of the New York City ordinance, the remainder – 24 – is also not a majority of the 51-employee complement.

$$51 - 12 \text{ (non-Esplanade)} - 15 \text{ (BSW)} = \mathbf{24}.$$

If one subtracts not all of the non-BSW workers who did not consider themselves members of the Union, but only the five recreation employees whom the Union has officially disavowed, the result is nineteen (19).

$$51 - 12 \text{ (non-Esplanade)} - 15 \text{ (BSW)} - 5 \text{ (recreation)} = \mathbf{19}.$$

All of these totals show that former Esplanade employees were not more than 50% of the non-management employees hired in December 2016.

**The Substantial and Representative Complement on April 20, 2017.** Of the 56 non-management employees who were employed by 305 West End as of April 20, 2017, only twenty-eight (28) are former Esplanade employees, exactly half, thus not a majority. Of those, twelve (12) did not pay Union dues and did not consider themselves part of the Union. Importantly, this number includes four (4) recreation assistants, whom the Union has officially disavowed. Thus, even if you subtract only those four (4) from the total of twenty-eight (28) former Esplanade employees, the result is twenty-four (24), clearly not a majority.

$$56 - 28 \text{ (non-Esplanade)} - 4 \text{ (recreation)} = \mathbf{24}.$$

If you subtract all twelve, the result is 16.

$$56 - 28 \text{ (non-Esplanade)} - 12 \text{ (non-Union)} = \mathbf{16}.$$

In short, the calculations inescapably prove that Respondent 305 West End did not hire a majority of its employee complement from the Esplanade, and is therefore not a *Burns* successor under any of the calculations set forth above.

Severance Offers. Esplanade invited the Union to engage in effects bargaining after the sale of the property, but the Union refused. Given the lack of cooperation from the Union, therefore, Esplanade in February 2017 offered severance payments to County Agency employees who were not hired by 305 West End. Severance was paid to the following employees in the following amounts (some did not sign releases and did not cash the checks):

Last name	First name	Dept	Total	Check Cashed	Severance Agreement Signed
A.	J.	ESPL KITCHEN	\$ 4,834.36	Yes	Yes
B.	T.	ESPL KITCHEN	\$ 10,958.32	No	No
C.	A.	ESPL KITCHEN	\$ 6,817.23	Yes	Yes
C.	A.	ESPL KITCHEN	\$ 6,415.41	No	No
D.	D.	ESPL KITCHEN	\$ 7,052.26	Yes	Yes
D.	D.	ESPL KITCHEN	\$ 5,325.00	Yes	Yes
D.	D.	ESPL KITCHEN	\$ 16,569.64	No	No
H.	T.	ESPL FRONT DESK	\$ 14,130.58	Yes	Yes
H.	J.	ESPL KITCHEN	\$ 5,151.20	Yes	Yes
H.	R.	ESPL KITCHEN	\$ 4,948.42	Yes	Yes
J.	L.	ESPL KITCHEN	\$ 9,938.78	Yes	Yes
J.	L.	ESPL KITCHEN	\$ 10,718.04	Yes	Yes
M.	J.	ESPL KITCHEN	\$ 7,867.07	Yes	Yes
M.	V.	ESPL FRONT DESK	\$ 7,977.39	No	No
P.	B.	ESPL KITCHEN	\$ 12,781.70	Yes	Yes
R.	I.	ESPL KITCHEN	\$ 5,151.20	No	No
S.	A.	ESPL KITCHEN	\$ 6,638.56	Yes	Yes
T.	L.	ESPL KITCHEN	\$ 15,786.77	Yes	Yes
W.	D.	ESPL KITCHEN	\$ 6,251.38	No	No

See R-52, GC-23, GC-30; Tr. 145, 183. A month after the severance was paid, on March 9, 2017, the Union filed an Unfair Labor Practice charge alleging “direct dealing” between Esplanade and

the employees. ULP No. 02-CA-195031. The Regional Director declined to issue a complaint with respect to this ULP principally because the Union had refused to engage in effects bargaining. *See Consolidated Complaint.*

The employees who accepted the severance payments signed documents entitled, “Acknowledgment and Release,” which released the employees’ claims under any and all potentially applicable employment statutes, including the National Labor Relations Act. *See R-52.*

Other Employees Who Should Not Be Listed in the Complaint. Although the Complaint identifies both Harpal Sudeshkumar and Lynda Joseph as individuals who were unlawfully denied employment, Mr. Sudeshkumar was hired and is still employed at 305 West End, and Lynda Joseph never applied. R-58, R-59; Tr. 947-948.

As previously noted above, the overwhelming evidence demonstrates that both D\_\_\_ D\_\_\_ and T\_\_\_ B\_\_\_ were statutory supervisors who should not have been permitted to maintain membership in the Union and should not be included in the Complaint. Tr. 146-150, 154, 160, 229-234, 243, 245-246, 248-250, 253-254, 556-557, 559-560, 584, 612-615, 640-641, 669-671; 729-730, 735-737, 773-774, 781-784, 788, 794, 800, 813-814; GC-21 at p. 2, R-55.

Finally, the Esplanade payroll records – GC-60 – demonstrate that Kimyetta Roberts, another employee identified in the Complaint, was discharged by the Esplanade during the October 11, 2016 pay period, two months before Respondent 305 West End acquired the property. *See also R-46.* No claim against Respondent can therefore be maintained on her behalf.

## ARGUMENT

- A. The Numbers Demonstrate Beyond Cavil That Respondent 305 West End Did Not Hire a Majority of its Employee Complement from the Predecessor’s Bargaining Unit, and the

Evidence Shows Lack of Substantial Continuity Between the Two Operation, Thus Precluding a Finding of *Burns* Successorship.

Counsel for the General Counsel has alleged that Respondent 305 West End is a successor employer under *NLRB v. Burns Int'l Security Services, Inc.*, 406 U.S. 272 (1972). *Burns* holds that a successor employer who voluntarily hires a majority of the predecessor's complement – where the predecessor's employees were represented by a Union – in an operation that is substantially similar to the predecessor's is obligated to bargain with the predecessor's Union representative. Determining whether the new company is a successor “is primarily factual in nature and is based upon the totality of the circumstances of a given situation.” *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987). The circumstances of the present case demonstrate that Respondent 305 West End is not a *Burns* successor, and it would be inappropriate to impose a bargaining commitment on the Respondent. “[O]ur nation’s labor policies have never included a preference for imposing a collective bargaining representative upon those who have not affirmatively chosen that representative by election.” *Be-Lo Stores v. NLRB*, 126 F.3d 268, 273 (4<sup>th</sup> Cir. 1997) (citing cases).

**1. The BSW Employees Who Were Retained Only Due to the Ordinance Cannot be Counted for Purposes of *Burns* Successorship.**

New York City Administrative Code § 22-505(a) requires employers who have taken over a property within the City to retain for at least 90 days employees called “Building Service Workers”, defined as follows (emphasis added):

The term “building service” means work performed *in connection with the care or maintenance of an existing building* and includes, but is not limited to, work performed by a watchman, guard, security officer, fire safety director, doorman, *building cleaner, porter, handyman, janitor*, gardener, groundskeeper, stationary fireman, elevator operator and starter, window cleaner, and superintendent.

The ordinance requires the successor employer to retain such employees for at least 90 days:

(5) A successor employer shall retain for a ninety (90) day transition employment period at the affected building(s) those building service employee(s) of the terminated building service contractor (and its subcontractors), or other covered employer, employed at the building(s) covered by the terminated building service contract or owned or operated by the former covered employer.

Only then can the successor evaluate each such employee on his or her merits to assess whether to retain or discharge the employee:

(8) At the end of the 90-day transition period, the successor employer shall perform a written performance evaluation for each employee retained pursuant to this section. If the employee's performance during such 90-day period is satisfactory, the successor contractor shall offer the employee continued employment under the terms and conditions established by the successor employer or as required by law.

The mandatory nature of the ordinance must be taken into account when considering a claim of *Burns* successorship. *Burns* states that the source of any duty to bargain with the predecessor's union representative is the "voluntary" choice of the successor to take over "a bargaining unit that was largely intact." *Burns, supra*, 406 U.S. at 287. "The Supreme Court has made it clear that *Burns* successorship is based on an employer's **voluntary** choice to hire more than fifty percent of its workforce from its predecessor's workforce." *Paulsen v. GVS Properties, LLC*, 904 F. Supp.2d 282, 290 (E.D.N.Y. 2012) (emphasis added).

Thus, the court in *GVS Properties* found that the New York City ordinance precluded a finding of *Burns* successorship upon hiring: "By limiting an employer's ability to discharge employees solely to cases of cause or redundancy, the Displaced Workers Act deprives the employer of making the voluntary decision that *Burns* requires in order to deem an employer to be a successor." 904 F. Supp.2d at 290. "Reading the Supreme Court cases on successorship alongside the language of the Displaced Workers Act, it is clear that a new employer cannot be deemed a *Burns* successor at the beginning of the 90-day period because it lacks the ability to choose whether to hire its predecessor's employees at that point." *Id.* at 290-291. "[S]ince

ultimately, GVS did not hire a majority of its employees from its predecessor, the Court determines that GVS was not a *Burns* successor. GVS, therefore, had no obligation to recognize or bargain with the Union.” *Id.* at 292.

It appears that the Counsel for the General Counsel intends to dispute that the employees identified by Respondent 305 West End as BSW workers were in fact properly so designated. It is difficult to understand the basis for any such argument. The definition of “Building Service Work” encompasses work “performed in connection with the care or maintenance of an existing building” and includes, but is not limited to, “work performed by a building cleaner, porter, handyman, [or] janitor...” New York City Administrative Code § 22-505(a). The employees designated by Respondent as Building Service Workers were housekeepers, janitors, and maintenance workers – precisely the types of employees described in the ordinance, employees who were charged with “care or maintenance” of the building. The purpose of the original 2002 ordinance was to protect the job security of frequently outsourced or contracted positions like cleaners and security guards; the 2015 amendments expanded the ordinance to protect not only outsourced positions but also cleaners and maintenance personnel who are employed directly by the building’s owner or tenant after the building changes hands. <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=2515189&GUID=996EDB08-31D8-45B9-9531-E1E1C7C7B21C> . The purpose of the ordinance is just as applicable to housekeepers, janitors and maintenance workers as to any of the other categories listed in the ordinance. It would certainly be a surprise to the drafters of the ordinance to hear the General Counsel of the NLRB argue for *narrower* coverage of such an employee-protective ordinance.

In any event, the record is undisputed that none of the housekeeping staff would have been hired if Respondent had not been obligated to hire them under the ordinance. *See* R-26; Tr. 516-

517. Obviously, if they had not been hired because of the ordinance, the numbers of former Esplanade employees hired by the Respondent would have been even lower than they were.

When the “Substantial and Representative Complement” Was Reached. The Supreme Court has directed that the assessment of whether a majority of the workforce comprises the predecessor’s employees must be made when a “substantial and representative complement” of the new employer’s staffing has been reached. *Fall River Dyeing, supra*, 482 U.S. at 47.

As shown by the undisputed testimony of Faraz Kayani and by the payroll records summarized in R-64 and R-65, a substantial and representative complement at 305 West End was not reached until April 20, 2017. As Kayani testified, the process of evaluating and discharging the housekeepers who did not make the grade began just after the 90-day period expired. It took time, however, for the process to be completed: for management to meet with the employees to effect their terminations, to post the positions that were now available, to receive applications, and to interview and hire the applicants. *See, e.g.*, Tr. 706-708 (Walsh) (evaluations were done when employees were at work, and not all were at work at the same time; the intent was to give them all a fair chance to be retrained; he met with them all the time as he tried to train them); 710-711 (the open positions were then posted and applicants interviewed); 934-936, 939, 979-980 (Kayani) (“[I]t’s operationally impossible for me to have all the ... BSWs hired from Esplanade to 305 West End to have a 90-day review tailored, done, and executed,” precisely on the 90<sup>th</sup> day, so some received their evaluations within the next month or six weeks). There were several housekeepers hired within the two weeks prior to April 20 to replace the ones who had been kept on due to the New York ordinance and then discharged after the probationary period. Tr. 952-953 (four or five housekeepers were hired in April). The proper date to consider the question of successorship was therefore not reached until April 20, 2017, by which time only 28 of the 56 full-time and part-time

employees were former Esplanade employees, not a majority, thus precluding any finding of *Burns* successorship.

The CGC may argue that the assessment of the representative complement at 305 West End should be made as of March 5, 2017, exactly 90 days after the takeover. Such a narrow interpretation again belies the very purpose of the ordinance, which is to provide these employees with a fair chance to earn employment with the successor. Artificially imposing a 90-day limit – *i.e.*, the employer must make its decision precisely on the 90<sup>th</sup> day, not before, pursuant to the ordinance, and not after, for purposes of *Burns* successorship – would operate to the detriment of both the employer and the employees by rushing a process that should be treated like any other probationary period. Employers that are sincerely giving their probationary employees a chance to settle in do not rush to judgment on the 90<sup>th</sup> day. Nothing would appear more artificial and more deliberately intended to avoid the effect of both *Burns* and the New York City Ordinance than an employer terminating each BSW employee holdover on exactly the 91<sup>st</sup> day of employment. The evidence here shows that the Respondent in good faith gave the employees the opportunity to earn their jobs, evaluated them at arms-length, and made the decisions to discharge and replace the way the Respondent or any other normal employer would do in the ordinary course of business. An artificial 90-day deadline would be illogical and is not supported by any legitimate legal premise.

“The correct test [for whether the substantial and representative complement has been reached] is whether at the time of recognition, the jobs or job classifications designated for the operation involved are filled or substantially filled and the operation is in normal or substantially normal production.” *Indianapolis Mack Sales*, 272 NLRB 690, 694 (1984), *enf’d denied*, 802 F.2d 280 (7<sup>th</sup> 1986). “The employer generally will know with tolerable certainty when all its job classifications have been filled or substantially filled, when it has hired a majority of the employees

it intends to hire, and when it has begun normal production.” *Fall River Dyeing, supra*, 482 U.S. at 50. “[I]n the collective bargaining context, a successor is only obligated to bargain when “the new employer makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor ... [and indeed] **intends** to take advantage of the trained work force of its predecessor.” *Resilient Floor Covering Pension Tr. Fund Bd. of Trustees v. Michael's Floor Covering, Inc.*, 801 F.3d 1079, 1092 (9th Cir. 2015) (emphasis in original), citing *Fall River Dyeing*, 482 U.S. at 41.

In cases in which the employer’s estimation has been rejected, there has often been some unusual element that has affected the numbers – see, e.g., *Hoffman ex rel. N.L.R.B. v. Inn Credible Caterers, Ltd.*, 247 F.3d 360, 367 (2d Cir. 2001) (employee roster proffered by employer reflected an increase in anticipation of the coming high season); *Hoffman v. Parksite Grp.*, 596 F. Supp. 2d 416, 422 (D. Conn. 2009) (employer acquired only two more employees within the seven months after taking over predecessor’s operation). In the present case, however, the undisputed evidence shows that the BSW employees were retained only because of the New York City ordinance; that they were officially evaluated shortly after the required 90 days had passed, also as required by the ordinance; that many were discharged; and that they were then replaced over the next few weeks, up to and including April 20, 2017 when a full complement of employees was reached.

**2. The Employees That the Union Knowingly Failed or Refused to Represent Cannot Be Counted for Purposes of Burns Successorship.**

Despite the broad unit definition in the collective bargaining agreement, the Union did not discharge its duties towards many of the former Esplanade employees. It actively refused to represent recreation employees, and numerous other employees in various different departments did not pay dues, did not participate in the Union, were not eligible for health insurance, and did not consider themselves part of the Union. The Union was aware of this – certainly its steward,

T\_\_\_\_ H\_\_\_\_, was aware<sup>6</sup> – and nevertheless acquiesced to the situation. *See, e.g.*, Tr. 611-612 (“[S]he had asked me did I want to join the union, and I told her I had no interest in being in the union...”), 731, 785, 791-792, 858, 862.

Neither T\_\_\_\_ H\_\_\_\_ nor any other representative of the Union made any attempt to seek dues from these employees and likewise made no attempt to enforce the union security clause despite having the right and obligation to do so. The Union permitted statutory supervisors to pay dues and be part of the Union, an undisputedly unlawful practice.<sup>7</sup> It is the successor of a manifestly corrupt union and yet did not take the actions necessary to distance itself from the corrupt practices of its predecessor; instead, it continued the same inappropriate conduct as the predecessor. In short, it was a “members only” union that chose to represent only a limited portion of the employees of the former Esplanade, including some that by law it should not have been representing.

There is no case law or Board law governing how to treat *Burns* successorship where the predecessor’s union was a “members only” union. Logic dictates, however, that those Esplanade employees who were not treated by the Union as Union employees (and who themselves did not

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<sup>6</sup> The shop steward’s knowledge is imputed to the Union. *Goski Trucking Corp.*, 325 NLRB 1032, 1034 (1998) (“While the testimony indicates that McFall may not have known about Go’s existence prior to 1994, inasmuch as Simmons was the shop steward, his knowledge is imputed to the Union.”); *Local 17, United Bhd. of Carpenters & Joiners of Am.*, 318 NLRB 196, 196 (1995) (shop stewards were acting as union’s agents in interactions with employer); *United Bhd. of Carpenters & Joiners of Am., Local 296*, 305 NLRB 822, 831 (1991) (same).

<sup>7</sup> *See, e.g.*, 29 U.S.C. 152(3) (“The term ‘employee’ ... shall not include ... any individual employed as a supervisor...”); *Westinghouse Elec. Corp. v. N. L. R. B.*, 424 F.2d 1151, 1158 (7th Cir. 1970) (emphasis added) (“A person ‘charged with the responsible direction of his department and the men under him,’ determining ‘under general orders which jobs shall be undertaken next and who shall do it,’ giving instructions for its proper performance and training in the performance of unfamiliar tasks, is above the grade of ‘straw bosses, lead men, set-up men or other minor supervisory employees’ and has supervisory power”; holding that authorization cards distributed by statutory supervisor could not be counted).

believe they were represented) should likewise not be counted as unit employees for purposes of *Burns* successorship. To hold otherwise would be to reward the Union for its negligence in failing to adhere to the terms of the collective bargaining agreement, which consisted not only of failing to collect dues and enforce the union security clause with respect to those employees, but also allowing statutory supervisors to maintain Union membership, against the clear dictates of the labor law. Furthermore, it would be utterly illogical to count, for successorship purposes, hourly employees who never believed or understood that they were members of a union, and who paid no dues nor received benefits or representation from that union. Such employees cannot, as a matter of law, be said to have “affirmatively chosen that representative” for recognition purposes. *See Be-Lo Stores v. NLRB*, 126 F.3d 268, 273 (4<sup>th</sup> Cir. 1997) (“[O]ur nation’s labor policies have never included a preference for imposing a collective bargaining representative upon those who have not affirmatively chosen that representative by election.”). “In their selection of a bargaining representative, § 9(a) of the Wagner Act guarantees employees freedom of choice and majority rule.” *Int’l Ladies’ Garment Workers’ Union, AFL-CIO v. N. L. R. B.*, 366 U.S. 731, 737 (1961) (where employer and union believed union represented majority, but it did not, the Court upheld order to hold election). “Individual and collective employee rights may not be trampled upon merely because it is inconvenient to avoid doing so.” *Id.*, 366 U.S. at 740.

Notably, the Administrative Law Judge need not find that the Union was a “members only” union to exclude these employees from the calculus. By analogy, an employer with a good faith belief that a union no longer represents a majority of the employees may withdraw recognition. *See Levitz Furniture Co. of the Pac., Inc.*, 333 NLRB 717 (2001) (employer may withdraw recognition of union where it has “objectively based, good-faith reasonable uncertainty as to the union’s majority status”); *N.L.R.B. v. Transpersonnel, Inc.*, 349 F.3d 175 (4<sup>th</sup> Cir. 2003) (employer

did not commit unfair labor practice in withdrawing recognition of union where evidence indicated that majority no longer supported it). Marcy Levitt, the Executive Director of the Esplanade for 12 years, had a good faith belief that a number of hourly employees at Esplanade were not represented by the Union, and for years acted in conformity with that belief. She was able to identify from memory the names of many hourly employees who had worked at the Esplanade who were not considered by County Agency or the Union as being in the bargaining unit. Tr. 237-239. Her undisputed testimony is that she was responsible for determining raises for the many employees who were not members of the Union. She testified that she was given a list each year by Esplanade's controller, Eli Singer, of the employees who were not members of the Union, and that she then personally designated their annual raises. Tr. 197, 235-240, 255-256.

Moreover, her belief was supported by the fact that the Union did not bill County Agency for dues or health insurance payments for these employees, and by the County Agency records showing that dues were not in fact deducted from these employees' paychecks. R-35-R-46; GC-60. Ms. Levitt's belief was also shared by shop steward T\_\_\_\_\_ H\_\_\_\_\_, who approached a number of these employees asking them to join the Union, but took no action whatsoever to enforce the Union security clause when they declined. *See, e.g.*, Tr. 611-612 ("[S]he had asked me did I want to join the union, and I told her I had no interest in being in the union..."), 731, 785, 791-792, 858, 862. The same good faith belief that would allow an employer to withdraw recognition should also eliminate those employees from any successorship calculus.

The CGC tried at the hearing to show that the non-Union employee raises in 2016 were the same as those given to the Union employees, but even if that is true, it does not contradict Levitt's testimony. Despite having two separate occasions on which to do so, the CGC did not examine Levitt to inquire whether or why she might have chosen to give the same raises to employees

within the same department, even though some were in the Union and some were not. (It seems perfectly logical that an employer might sometimes prefer to avoid too much of a salary difference between employees who did the same job and might compare notes.). Or there could have been a different reason for the similarity of the raises in 2016, but since the CGC never asked Ms. Levitt, there is nothing in the record to explain it one way or the other.

Moreover, the CGC has presented only one year of Esplanade payroll records, those for 2016. There is no evidence regarding the payroll for the previous 11 years that Levitt was Executive Director, or even the previous three years during which Local 2013 had replaced Local 348S, and no reason to believe that 2016 was particularly representative with respect to what raises Levitt elected to give. Most importantly, there is no evidence rebutting Ms. Levitt's testimony that she alone decided the raises given to these non-Union employees. That this occurred for years while Ms. Levitt was Executive Director – including the period of time in which this Union, not Local 348S, purported to be the employee representative – clearly shows that the Union did not represent all of the employees that would otherwise have comprised the bargaining unit in the broad unit definition of the CBA.

There is therefore good reason to exclude from any calculation of the Esplanade's bargaining unit those employees who did not pay dues, did not receive health benefits, did not consider themselves members of the Union, and whom the Union chose not to represent. As shown above, the exclusion of the non-Union employees from the successorship calculations further demonstrates that the Respondent never hired a majority of its employees from the Esplanade's bargaining unit.

**3. The Business at 305 West End is Not a Continuation of the Esplanade's Senior Living Hotel, But is Becoming a Licensed Assisted Living Facility.**

The undisputed record evidence establishes that the current operation is substantially different from the Esplanade, Respondent's predecessor at the property. The Esplanade was merely a location in which senior citizens could choose to live. From its inception, the operation at 305 West End has been developed as a high-end assisted living residence, licensed by the New York Department of Health and subject to numerous specific legal requirements, such as the provision of medical assistance, the ability to identify, report, and potentially resolve residents' medical problems, and complying with numerous other specific requirements imposed by the Department of Health for the benefit of the residents. Unlike the Esplanade, 305 West End takes legal responsibility for the health and well-being of the residents.

In *Smegal v. Gateway Foods of Minneapolis, Inc.*, 819 F.2d 191 (8th Cir. 1987), the Circuit Court concluded that the defendant was not a successor employer where it purchased what amounted to a subcontract of the predecessor's operation, never hired a majority of its employees from the predecessor, reorganized the operation, and provided a different service – large-scale food wholesaler versus retail grocery business. The court described a seven-factor test to determine whether the new company was a successor: “1) substantial continuity of the same business operations, 2) use of the same plant, 3) continuity of the work force, 4) similarity of jobs and working conditions, 5) similarity of supervisory personnel, 6) similarity in machinery, equipment, and production methods, and 7) similarity of products or services.” In analyzing these factors, the court concluded, among other things:

[W]hile the occupations of National employees remained the same, the transition to large scale wholesaling, and the new organizational structure of Gateway necessarily changed the nature of their jobs and working conditions. The mix of the employees included changes of supervisory personnel as well. On the whole, the weight of these factors suggests that Gateway is not a successor employer.

819 F.2d at 194. *See also Kessel Food Markets, Inc. v. N.L.R.B.*, 868 F.2d 881 (6th Cir. 1989) (affirming Board's conclusion that the employer was not a successor because various facts established that the employer would not have hired the predecessor's entire work force: it used a larger work force comprising more part-time employees, had different operating methods for the purposes of enhanced customer service, and in any event, many of the predecessor's employees did not apply); *Reynolds v. RehabCare Grp. E. Inc.*, 590 F. Supp. 2d 1107, 1112-1113 (S.D. Iowa 2008), *aff'd*, 591 F.3d 1030 (8th Cir. 2010) (using the *Smegal* test to conclude that the defendant, a new vendor of physical therapy services at the subject location, was not a successor of the previous vendor, plaintiff's employer, for purposes of the plaintiff's USERRA lawsuit); *Trustees of Roofers Local No. 96 Fringe Benefit Funds v. Duluth Architectural Metals*, 2005 WL 1593039, at \*2 (D. Minn. July 1, 2005) (using a similar test to conclude that defendant was not liable for a predecessor's unpaid contributions to plaintiff union's ERISA plan where the only relationship between the two operations was that the defendant purchased the predecessor's equipment).

Respondent 305 West End is not a *Burns* successor to the Esplanade. It did not hire a majority of its employee complement from the Esplanade, continuity of operations is lacking as the employees are retrained to assisted living standards, and the operation itself continues to undergo significant wholesale changes. The allegations of the Consolidated Complaint asserting that Respondent 305 West End is a *Burns* successor should be dismissed.

B. The Overwhelming Evidence Shows That Union Status Was Never Considered in the Hiring Decisions.

The applications and resumes submitted by the former Esplanade employees were provided to the CGC in discovery. None of them identifies the applicants' Union affiliation. Exhibit R-24 shows that the interviewing managers were specifically instructed not to inquire about the applicants' Union status, and the evidence is undisputed that they did not do so. The unanimous

testimony indicated that the interviewers were unaware of the applicants' Union status (with the exception of Union steward T\_\_\_\_ H\_\_\_\_), that they did not inquire about applicants' Union affiliation during interviews, and that the applicants' Union status was of no concern to the Respondent's hiring managers. Notably, the interviewers generally understood that some hourly employees were in the Union and others were not, without any identifying details. The record discloses no anti-Union attitudes or slurs by any of the Respondents' representatives, nor any other evidence suggesting anti-Union animus.

If the Respondent had schemed to avoid hiring Union employees in order to avoid successorship, it surely would have hired a much smaller number of former Esplanade employees so that the issue of *Burns* successorship would never arise. Faraz Kayani, the final decisionmaker regarding the hiring decisions, testified unequivocally that he did not even know about the law of successorship, and therefore had no reason to care one way or the other whether the employees he hired were or were not former members of the Union. Tr. 1005-1006.

To establish a discriminatory refusal to hire violation, the General Counsel must, at the hearing on the merits, show: (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants.

*Fes, A Div. of Thermo Power*, 331 NLRB 9 (2000). "If established, the respondent must show that it would not have hired the applicants even in the absence of their union activity or affiliation."  
*Id.*

"The proper test to be applied in refusal to hire cases is whether there is substantial evidence that an adverse employment decision was motivated by unlawful animus toward the union."

*Brown & Root, Inc. v. N.L.R.B.*, 333 F.3d 628, 638 (5th Cir. 2003). “Of course, the finding of a Section 8(a)(3) violation may be supported through circumstantial, rather than direct evidence. That evidence, however, must be **substantial**, not speculative, nor derived from inferences upon inferences.” *Brown & Root, id.*, 333 F.3d at 639 (citation omitted, emphasis in original).

There is no dispute as to the first element of the three-part test – the Respondent was hiring – and no evidence whatsoever of the third, anti-union animus. The CGC is attempting to combine elements two and three by suggesting that the Respondent’s hiring decisions were themselves somehow indicative of anti-union animus. To wit, the CGC appears to be taking the position that the Respondent did not hire the employees identified in Paragraph 13 of the Consolidated Complaint due to anti-union animus, despite the lack of any evidence to support such a conclusion.<sup>8</sup>

At the hearing, however, the CGC set forth no evidence regarding the Respondent’s reasons for not hiring the employees identified in the Complaint. ***In fact, the CGC did not present evidence with respect to the great majority of the individuals named in the Complaint*** – of those, only D\_\_\_\_\_ D\_\_\_\_\_ and V\_\_\_\_\_ M\_\_\_\_\_ testified. What is on the record came from the Respondent’s witnesses. Thus, for example, Rich Youngberg testified that D\_\_\_\_\_ C\_\_\_\_\_ was hired at the front desk instead of V\_\_\_\_\_ M\_\_\_\_\_ simply because D\_\_\_\_\_ C\_\_\_\_\_ was available to work a weekend day and V\_\_\_\_\_ M\_\_\_\_\_ was not, and the Respondent did not need so many

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<sup>8</sup> As discussed above, one of the individuals identified in Paragraph 13 was actually hired and is still employed with Respondent, Harpal Sudeshkumar. Tr. 947. Another, Lynda Joseph, never applied. Tr. 947-948 and R-58. Testimony revealed that two others, Deannie Duncanson and Terrell Brannon, were statutory supervisors. Tr. 146-150, 154, 160, 229-234, 243, 245-246, 248-250, 253-254, 556-557, 559-560, 584, 612-615, 640-641, 669-671; 729-730, 735-737, 773-774, 781-784, 788, 794, 800, 813-814. Finally, GC-60 and R-46 show that Kimyetta Roberts was discharged by the Esplanade during the October 11, 2016, pay period, two months before Respondent 305 West End acquired the property.

front desk employees. Tr. 758-759. Both were members of the Union. R-62. Youngberg, the manager who interviewed shop steward T\_\_\_\_ H\_\_\_\_, volunteered the information that he knew she was the shop steward. He also indicated his recollection that she evinced a poor attitude during the interview, and on that basis he did not recommend hiring her. Tr. 756-757.

While certain front desk personnel were not hired, the record reflects that several were, and that many who were hired were members of the Union. *See* R-62 (M\_\_\_\_ B\_\_\_\_, D\_\_\_\_ C\_\_\_\_, and F\_\_\_\_ M\_\_\_\_ were all hired for the Admin/Reception/Concierge department, and all were dues-paying members of the Union). The record is also undisputed that the Respondent has cut back on the number of positions available at the front desk, so that there were fewer openings available. Tr. 409-410. Numerous Union members were hired in various departments at 305 West End, even if one does not count the BSW employees. *See* R-62.

The fact that the Respondent hired some but not all of the former Union employees is hardly “substantial” evidence of anti-union animus. “There can be no violation if there was no refusal to hire or if there were no positions available of the type applied for. Therefore, in reviewing a § 8(a)(3) claim ..., we would have to determine that not only did anti-union animus exist, and that a failure to hire circumstance occurred, but also that the employees involved were actually qualified for the respective job positions and that there were job positions actually available.” *N.L.R.B. v. Pneu Elec., Inc.*, 309 F.3d 843, 858 (5th Cir. 2002), citing *NLRB v. Fluor Daniel, Inc.*, 161 F.3d 953 (6th Cir.1998). “This approach seems the more equitable balance between the interests of individual applicants and those of the employer, who otherwise might be exposed to liability even if it legitimately had no job openings available at all.” *Pneu Elec., id.*

The CGC set forth no evidence of any 8(a)(3) violation beyond the fact that some of the members of the Union were not hired. This is simply not enough to prove that anti-union animus was the cause.

The record indicates that Brown & Root hired more than 25% of the Brown-Eagle hourly employees who applied, which may or may not qualify as “a large portion;” it does seem more than “a small portion” and not an “insignificant number” of the employee pool. Brown & Root’s statements [that B & R planned to hire a significant number of the existing work force to assure a smooth changeover] made no commitments; they did declare the general intention that there would be continuity of operations and it recognized the value of trained employees to achieving that goal. It is particularly difficult to see how Brown & Root’s commitment to hire employees known to be union demonstrates any anti-union animus...

*Brown & Root, supra*, 333 F.3d at 641 (declining to find 8(a)(1) violation from respondent’s statement that it was non-union and would remain non-union or an 8(a)(3) violation from its failure to hire a majority of its workforce from the predecessor).

The overwhelming, indeed undisputed, evidence is that the interviewing managers’ priorities were attitude and personality over experience. As they all explained, willingness to be trained was the most important factor for hiring in most positions; given the conditions of the Esplanade discovered upon inspection, prior experience was not nearly as much a concern as was attitude. *See, e.g.*, Tr. 704-705 (Walsh): “I have trained people that have no experience that turned out to be, you know, quality workers, and it is just based on their attitude and wanting to work and wanting to be a part of a great team. ... We have people that have ... experience and with their attitude, you know, they don’t want to take directives, poor attendance. So that doesn’t really make my decision.”; Tr. 999 (Kayani): “I’d rather train what I inherited ... and got rather than find someone from outside.” In short, the CGC has elicited no evidence of anti-union bias in hiring.

C. Employees Who Signed Releases and Accepted Severance Pay Are Not Eligible to Bring Claims Through the Board.

As shown in the chart in the Background section, thirteen (13) former Esplanade employees signed Acknowledgment and Releases and accepted severance pay from the Esplanade. These employees (some of whom are named in the Complaint) are estopped from seeking any relief through the Board. The Board has outlined the factors to be considered in determining whether to give effect to private, non-Board settlements:

- (1) whether the parties have agreed to be bound, and the position taken by the General Counsel regarding the settlement;
- (2) whether the settlement is reasonable in light of the violations alleged, the risks inherent in litigation, and the stage of litigation;
- (3) whether there has been any fraud, coercion, or duress by any party in reaching the settlement; and
- (4) whether the respondent has a history of violations of the Act or has breached past settlement agreements.

*Hughes Christensen Co.*, 317 NLRB 633, 634 (1995). In *Hughes Christensen*, the Board found that three alleged discriminatees had waived their rights to seek recompense through the Board because consideration of the four factors supported such a conclusion: The enhanced severance benefits that they accepted in exchange for releases of claims were a “reasonable adjustment ... in light of the potential costs and risks inherent in any litigation”; charges filed on behalf of the alleged discriminatees were not pending at the time the agreements were signed; although the General Counsel and the union opposed the agreements, there was no contention that the agreements were fraudulent or obtained under duress; the alleged discriminatees had been given sufficient time to consult an attorney and consider revocation; and the respondent had no history of violating the Act or breaching previous settlement agreements.

A similar fact pattern holds here. At the time the severance was offered in exchange for releases, there was no “direct dealing” charge pending and indeed, the direct offers were made to

individual employees specifically because the Union’s legal counsel refused to engage in effects bargaining with Esplanade representatives, the basis upon which the “direct dealing” charge was not included as part of this case by the Counsel for the General Counsel. The employees were given free opportunity to sign or not sign the agreement and thus to accept or not to accept the severance payments, and indeed, a few of them elected not to accept. No evidence of coercion or duress was present. Further, the settlement amounts were more than reasonable given the stage of the dispute and inherent risks. Indeed, the employees who were offered settlement payments – which were calculated based on tenure – had not been hired by Respondent as of December 5, 2016 only two months prior to the offer being made, yet were offered between \$4,834.36 and \$16,569.64. Notably, T\_\_\_\_ H\_\_\_\_\_, one of the named employees in the Consolidated Complaint and the Union’s shop steward, accepted \$14,130.58 in exchange for her voluntary agreement to release County Agency, Esplanade and its successors. She could have declined to sign the release, like V\_\_\_\_ M\_\_\_\_ had decided to do, but she instead consciously chose to take this significant payment in exchange for her voluntary release. Given her position, she undoubtedly consulted with the Union’s counsel before deciding to sign the agreement.

Finally, Esplanade had no history of violating the Act or breaching previous settlement agreements. *See also Phillips Pipe Line Co.*, 302 NLRB 732 (1991) (release of “claims, causes of action, or grievances pending and/or resulting from circumstances predating the execution of the release” was valid); *BP Amoco Chemical-Chocolate Bayou & Paper*, 351 NLRB 614, 615-616 (2007) (upholding agreements whereby alleged discriminatees accepted enhanced severance benefits and waived claims arising from the termination of their employment where no charges had yet been filed, and “there was significant risk that a charge alleging discriminatory selection would not be meritorious ... and the record does not show that all of the alleged discriminatees

had engaged in protected activity or that the Respondent was aware of it. Moreover, the selection process was a careful and lengthy one supported by business justifications...”; the employees had time to consider acceptance or rejection, and there was no evidence of duress or fraud, and the respondent had no history of violating the act or breaching previous settlement agreements). The thirteen (13) employees who signed the releases and accepted severance pay are not eligible to seek relief through the Board and those individual claims should be dismissed as a result.

### **CONCLUSION**

Respondent 305 West End took over this property with the intention of taking what was a poorly-run, corrupt senior living residence and turning it into a first-class, licensed assisted living residence consistent with 305 West End’s business model. Priority was given to hiring employees whose attitudes would best make them amenable to the dramatically higher standards required of them by Respondent and whose personalities would be most suitable to dealing with wealthy long-term residents of the kind that high-level assisted living properties attract. Union affiliation was not considered.

Nevertheless, because the standards for employment with the former Esplanade were so much lower than those expected for employees of the high-end property being developed by the Respondent, a majority of the Respondent’s unionized workforce never comprised former Esplanade workers. The Building Service Workers, particularly housekeepers, whose retention was required by New York City Code § 22-505 were discharged and replaced within a few weeks after the 90 days for which retention is required by the ordinance, so that a “substantial and representative complement” was not achieved until April 20, 2017. Moreover, the Union itself actively refused to represent many of the former Esplanade employees who were hired by the

Respondent; those individuals cannot be legitimately counted as unit employees for purposes of *Burns* successorship.

For all of the foregoing reasons, Respondent 305 West End respectfully requests that the ALJ dismiss the Consolidated Complaint and Amended Consolidated Complaint and rule that the Respondent has no obligation to bargain with the Union, and no obligation to any of the individual employees listed in the Consolidated Complaint, as amended.

Dated: This 27<sup>th</sup> day of August, 2018.

STOKES WAGNER

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UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 2

COUNTY AGENCY, INC., AND  
ESPLANDADE PARTNERS LTD d/b/a  
ESPLANADE VENTURE PARTNERSHIP  
d/b/a THE ESPANADE HOTEL, JOINT  
EMPLOYERS

Case No. 02-CA-188405

and

305 WEST END HOLDING, LLC d/b/a 305  
WEST END AVENUE OPERATING, LLC,

Case Nos. 02-CA-189863  
02-CA-195031

and

UNITED FOOD & COMMERCIAL  
WORKERS UNION, LOCAL 2013.

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the Post-Hearing Brief of Respondent 305 West End was electronically filed with Region 2 and E-mailed to counsel for petitioner below:

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The forgoing was also emailed to the Honorable Benjamin Green at benjamin.green@nlrb.gov.

Dated: August 27, 2018.

/s/ Paul Wagner  
Paul Wagner